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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 38

SUN OIL COMPANY,

Petitioner,

vs.

DALZELL TOWING COMPANY, INC.,

Respondent.

BRIEF FOR RESPONDENT ON WRIT OF CERTIORARI

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SUBJECT INDEX

	PAGE
I. The opinions of the Courts below	1
II. Statement of the case	2
The contract between the parties	4
Laches	5
District Court opinion	6
Circuit Court of Appeals opinion	6
III. Argument	
Summary of argument	7
FIRST POINT	
There was an express contract between the parties and the "Pilotage Clause" was part of the contract	8
SECOND POINT	
The contract was to furnish tugs to "assist" a steamer under her "own propelling power", not for towage	12
THIRD POINT	
The Pilotage Clause is valid and relieved respondent from liability for damages sustained as a result of the stranding	18
FOURTH POINT	
The tug captain (pilot) was the servant of petitioner pursuant to the terms of the Pilotage Clause	26
FIFTH POINT	
The pilot (tug captain) was not negligent	33
Danger of the manœuvre	34
SIXTH POINT	
Petitioner assumed the risk of the manœuvre	40
SEVENTH POINT	
Petitioner failed to prove its case	44
Laches	45
CONCLUSION	
The decision of the Circuit Court of Appeals should be affirmed	45

TABLE OF CASES CITED

PAGE

Alaska Commercial Co. *v.* Williams, 128 Fed. 362.... 25
Allaguash, The, 1930 A. M. C. 1981..... 22
American Eagle, The, 54 Fed. 1010..... 25

Baltimore & Ohio, etc., Rwy. *v.* Voigt, 176 U. S. 498.. 19
British Columbia *v.* Mylroie, 259 U. S. 1..... 24

Calzavaro *v.* Planet S. S. Corp., 31 F. (2d) 885..... 24
Caspian, The (Pan American *v.* Martin and Steamtugs Caspian and Adriatic), 14 F. (2d) 1006; affirmed 14 F. (2d) 1013.....32, 38, 45
Central Wharf Towboat Company *v.* Furness Withy, 269 Fed. 950..... 14
China, The, 7 Wall. 53.....20, 30, 43
City of Los Angeles *v.* Standard Transp. Co., 32 F. (2d) 988 30
Clarence L. Blakeslee, The, 243 Fed. 365..... 38
Compania de Navegacion *v.* Firemen's Fund Insurance Company (The Wash Gray), 277 U. S. 66..7, 13, 15, 22, 23, 25

Dampskibsselskabet Atalanta *v.* United States, 31 F. (2d) 961 ..... 30, 39
Denton *v.* Yazoo & Miss. Valley Rld. Company, 284 U. S. 305 21
Dysart *v.* Missouri, K. & T. Ry. Co., 122 Fed. 228..... 42

E. A. Packer, The, 22 Fed. 668..... 43
Edgar H. Vance, The, 284 Fed. 56..... 43
Edmund L. Levy, The, 128 Fed. 683..... 25
Edward G. Murray, The, 278 Fed. 895..... 32
Eli B. Conine, The, 233 Fed. 987..... 38
Energy, The-Altamaha, 1926 A. M. C. 917 (not reported in Federal) 17, 22
Express, The, 52 Fed. 890..... 14

PAGE

Foreign Transport Co. *v.* Moran (The Margaret A. Moran), 57 F. (2d) 143 22
Frederick E. Ives, The, 25 Fed. 447 39

Georgia, The, 31 F. (2d) 759 15
Globe & Rutgers *v.* Warner Sugar Refining Company, 187 App. Div. (N. Y.) 492 42
Graves *v.* Davis, 235 N. Y. 315 ..... 18, 25, 26

Hagood, The, 1925 A. M. C. 1646 22
Harold, The, 287 Fed. 757 37
Hartford Fire Insurance Co. *v.* Chicago, Milwaukee & St. Paul Rwy. Co., 175 U. S. 91 19

John G. Stevens, The, 170 U. S. 113 25
Jonty Jenks, The, 54 Fed. 1021 25
Jure *v.* United Fruit Company, 6 F. (2d) 6 30

Lafayette, The, 269 Fed. 917 39
Lee & Simmons Inc. *v.* Peursum, 1931 A. M. C. 699 ... 22
Lizzie F. Walker, The, 3 F. (2d) 921 40
Long *v.* Lehigh Valley Railroad Co., 130 Fed. 870 26

M. J. Cummings, The, 18 Fed. 178 25
Margaret, The, 94 U. S. 494 ..... 18, 25
Margaret A. Moran, The (Foreign Transport Co. *v.* Moran), 57 F. (2d) 143 22
McCaffrey's, Owen, Sons *v.* Director General, 282 Fed. 728 26
McCormick *v.* Shippy, 124 Fed. 48 ..... 19, 26
McGirr's Sons *v.* Mutual, 1927 A. M. C. 382 22
Mercer, The, 297 Fed. 981 ..... 18, 25
Merchants' Bank *v.* State Bank, 10 Wall. 604 42
Monarch, The, 235 Fed. 795 25
Monk *v.* Cornell Steamboat Company, 198 Fed. 472 ... 25
Moran, *In re,* 120 Fed. 556 25
Mylroie *v.* British Columbia Mills Tug & Barge Co., 268 Fed. 449, 259 U. S. 1 25

PAGE

New World, The Steamboat, *v.* King, 16 How. 469.... 40
Niels R. Finsen, The, 52 F. (2d) 795..... 22
Nonpareil, The, 1924 A. M. C. 312..... 21

Oceanica, The, 144 Fed. 301; 170 Fed. 893; certiorari denied, 215 U. S. 599..... 13, 25
Oran, The (Oriental Navigation Co. *v.* S. S. Watertown), 1930 A. M. C. 1523 (not reported in Federal) 32
Oriental Navigation Co. *v.* S. S. Watertown (The Oran), 1930 A. M. C. 1523 (not reported in Federal) 32

Pacific Maru, The, 8 F. (2d) 166..... 22, 39
Pan American *v.* Martin and Steamtugs Caspian and Adriatic (The Caspian), 14 F. (2d) 1006; affirmed 14 F. (2d) 1013.....32, 38, 45
Primrose, The, 42 F. (2d) 827..... 37
Procida, The, 243 Fed. 251..... 32

Robins Dry Dock & Repair Co. *v.* Navigazione Libera Triestina, S. A., 32 F. (2d) 209..... 30
Ryan *v.* Hook, 34 Hun (N. Y.) 185..... 12

Sacramento Navigation Co. *v.* Salz, 273 U. S. 326..... 18, 24
Santa Fe Rwy. *v.* Grant Brothers, 228 U. S. 177..... 19, 21
Sarnia, The, 261 Fed. 900..... 14
Sea Lion, The, 12 F. (2d) 124..... 25
Somers N. Smith, The, 120 Fed. 569..... 25
Southern Cross, The, 1927 A. M. C. 457..... 38
Standard Oil Co. *v.* Anderson, 212 U. S. 215.....21, 29, 43
Stevens *v.* White City, 285 U. S. 195, 1932 A. M. C. 468 ..... 12, 34
Stifinder, The, 275 Fed. 271..... 39
Sturgis *v.* Boyer, 24 How. 110..... 14
Syracuse, The, 12 Wall. 167.....7, 13, 15, 22, 23, 25

Ten Eyck *v.* Director General, 267 Fed. 974; certiorari denied, 254 U. S. 646..... 25
Transportation Line *v.* Hope, 95 U. S. 297..... 18

PAGE

United States *v.* Jacksonville Co., 18 F. (2d) 39..... 37
United States *v.* Norfolk-Berkley Bridge Corp., *et al.*, 29 F. (2d) 115..... 25

Vim, The, 40 F. (2d) 638..... 25

Wash Gray, The (Compania de Navegacion *v.* Firemen's Fund Ins. Co.), 277 U. S. 66....7, 13, 15, 22, 23, 25
Watertown, The-Oran, 1930 A. M. C. 1523..... 22
Webb, The Steamer, 14 Wall. 406..... 18
Wells Fargo & Co. *v.* Taylor, 254 U. S. 175..... 18
Wireless No. 1, The, 290 Fed. 239..... 17, 22

Pilotage Clause 4

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

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BRIEF FOR RESPONDENT ON WRIT OF CERTIORARI

I.

THE OPINIONS OF THE COURTS BELOW

This is a review on writ of certiorari of a decision in admiralty of the United States Circuit Court of Appeals for the Second Circuit, affirming a decision of the District Court for the Southern District of New York dismissing petitioner's libel against the steamtugs *Dalzellite, W. F. Dalzell* and *Fred B. Dalzell, Jr.,* in *rem,* and against the Dalzell Towing Company, Inc., respondent, in *personam.**

The opinion of the District Court was rendered on November 25, 1930, and is printed at pages 75-9 of the record. It is reported in 48 F. (2d) 598.

The opinion of the Circuit Court of Appeals was rendered on January 11, 1932, and will be found at pages 84-9 of the record. It is reported in 55 F. (2d) 63.

* The tugs *Dalzellite, W. F. Dalzell* and *Fred B. Dalzell, Jr.,* are not involved in the appeal to this Court.

II.

Statement of the Case

Petitioner is the owner and operator of the tank steamship *Sabine Sun* (R. 14). Respondent is engaged in the tugboat business in and about New York Harbor, and as such furnishes tugs (not owned by it) to assist steamers in and around the harbor. At the times involved in the instant case respondent operated, among others, the steamtugs *W. F. Dalzell, Dalzellite* and *Fred B. Dalzell, Jr.* (R. 5, 61, 64).

The cause of action arose out of the grounding of petitioner's steamship *Sabine Sun* on an obstruction in Newark Bay in the vicinity of Bergen Point on May 15, 1925. At the time of the accident the *Sabine Sun* was navigating under her own propelling power and was being assisted by tugs furnished by respondent. The steamer's bottom was damaged by reason of striking the obstruction, and it was to recover for this damage that the libel was filed.

All the witnesses testified in open Court, two for libellant and three for respondent.

The facts involved are as follows:

On May 14, 1925, the Assistant Marine Superintendent of Sun Oil Company (petitioner) came to New York from petitioner's main office at Marcus Hook, Pennsylvania, to arrange for the docking of its steamship *Sabine Sun* (using her own propelling power) at Texas Oil Company's plant, Bergen Point, New Jersey. The order for tugs to assist the steamer to her berth was given to the Dalzell Towing Company, Inc. (respondent) by petitioner's superintendent on May 14, 1925 by telephone (R. 14-15, 23-4).

The *Sabine Sun* arrived in New York Harbor on May 14, anchored off Stapleton, Staten Island, and lightered sufficient

cargo to reduce her draft to 24 feet. On the afternoon of May 15, tug *W. F. Dalzell* came alongside the steamer, which then got under way for Bergen Point, with Bennett, captain of the *W. F. Dalzell,* on the steamer's bridge acting as pilot. The steamer was joined by tug *Dalzellite* off St. George, Staten Island, and proceeded under her own steam through Kill van Kull. When off Port Richmond, the flotilla was joined by tug *Fred B. Dalzell, Jr.,* where the captain of the latter (Fort) went on the steamer's bridge and took charge of her navigation, relieving Captain Bennett as pilot * (R. 15, 18, 32, 47).

There were on the steamer's bridge at this time, in addition to the two tug captains, the steamer's master, third officer, quartermaster, and Turnbull, petitioner's assistant marine superintendent. The weather was clear, no wind, tide flood, about one hour before high water (R. 32, 48).

Petitioner's superintendent (Turnbull) had been in New York a number of times before and had ordered tugs from respondent to assist petitioner's steamers to their berths. He had always proceeded on the steamer to destination, and on each occasion a tug captain from one of the assisting tugs had boarded the steamer and acted as pilot. Petitioner's superintendent "expected" a tug captain to act as pilot on this occasion and accepted the tug captain (Fort) to act in that capacity (R. 24-6, 29, 86-7).

Upon boarding the steamer, the tug captain (Fort) informed petitioner's superintendent (Turnbull) that there was considerable risk in taking a steamer of the size and draft of the *Sabine Sun* into Newark Bay at that particular time, because of the blasting and dredging operations which were

* Captain Bennett was not familiar with nor licensed for the water further on; Captain Fort was licensed for those waters; he had been piloting steamers in and out of Newark Bay for many years (R. 31, 41-2, 47-8).

going on in the vicinity of Bergen Point, and the absence of reliable charts and aids to navigation. Petitioner's superintendent agreed to take the risk, relying on Captain Fort, who had previously acted for him as pilot* (R. 35, 48, 76).

The *Sabine Sun* then proceeded under her own steam (using her own propelling power) to Bergen Point and made the usual turn—about 90° to starboard—into Newark Bay with the assistance of the three tugs. While proceeding up the Bay on the usual ranges† about 3:30 P. M., the steamer struck an obstruction on the bottom and remained fast. Cargo was lightered from her forward tanks and she then proceeded to her destination about 6 P. M. (R. 17, 55).

There were no reliable charts of the vicinity and no established aids to navigation other than Bergen Point Light. A number of other steamers have struck obstructions on the bottom in the same vicinity (R. 33-4, 36, 57-60).

The Contract Between the Parties

The "pilotage clause," which was a part of the contract between the parties, provided as follows:

"When the captain of any tug furnished to or engaged in the service of assisting *a vessel which is making use of her own propelling power* goes on board said vessel, or any other

* Turnbull at first testified that he did not remember any conversation with the pilot (R. 26). Later he denied that he had had any conversation with the pilot having to do with the character of the channel and the dangers and risk to be incurred (R. 27-8). Although the District Court found it unnecessary to pass upon this conversation between the pilot and Turnbull, the language of the opinion indicates that the Court believed that it did take place (R. 77). Turnbull also denied knowledge of the "pilotage clause", but both the Courts below found against him on this issue (R. 78, 89).

† The usual ranges consisted of a gas tank and a street on Staten Island. The pilot since used the same ranges with vessels of the same and greater draft and at the same stage of the tide, without accident (R. 33-4, 36, 59-60).

licensed pilot goes on board said vessel, it is understood and agreed that said tugboat captain or licensed pilot becomes the servant of the owners of the vessel *assisted* in respect to the giving of orders to any of the tugs furnished to or engaged in the assisting service and in respect to the handling of such vessel, and neither those furnishing the tugs and/or pilot nor the tugs, their owners, agents or charterers shall be liable for any damage resulting therefrom (Exhibit C; R. 67-8, 86).

As usual in cases of this kind, the order for tugs consisted merely of a telephone request by petitioner's superintendent, accepted by respondent's office representative, to send tugs to *assist* in *berthing* the steamer which was making "use of her own propelling power" at a certain time and place. Nothing was said about a pilot, but petitioner's superintendent (Turnbull) understood that one of the tugboat captains would come up on the steamer's bridge and take charge as pilot (R. 24-5, 29). The parties had previously done business on this basis and the full terms of the contract must be spelled out from the previous dealings between the parties (R. 85-7).

Laches

No claim was made in behalf of petitioner against respondent, nor was any intimation received by respondent that there would be any claim of liability against respondent until nearly a year after the accident (R. 49-50).

Although a survey of the damage to the steamer was held shortly after the accident, no notice of survey was given to respondent, nor was respondent afforded an opportunity of attending upon the survey (R. 49).

District Court Opinion

Petitioner contended below that the "pilotage clause" was not a condition of the contract between petitioner and respondent and that Turnbull (petitioner's superintendent) had no knowledge that the clause was a condition of the engagement of the tugs.* On this question of fact the District Court found against petitioner, saying:

"Copies of respondent's 'Pro Forma Towage Rates and Contract with Dalzell Towing Company, Inc.', containing the above quoted clause, were forwarded to libelant's office on November 15, 1923, December 28, 1923 and June 10, 1924, in response to inquiries concerning towage charges. One of such copies was received by Mr. Innis, a clerk in libelant's office; another by the office manager of libelant's marine office; and a third by Mr. Turnbull himself. In a letter which accompanied the rate schedule which was sent to libelant and received by Innis, the respondent said:

> 'We are attaching herewith a towage schedule and would like to call your attention to the last paragraph marked with an "X".'

This reference was to the pilotage clause set out above.

"Respondent usually handled the vessels of libelant in this port, and inasmuch as the pilotage clause is printed on the bills for services rendered by respondent, to say nothing of the attention which was drawn to the clause by respondent's letter, there can be no doubt that libelant should be charged with knowledge of the terms on which respondent offered to furnish towing services" (R. 78).

Circuit Court of Appeals Opinion

The Circuit Court of Appeals found also that "the contract between the parties included the 'pilotage clause' as one of its terms" (R. 87).

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* The same contention is made in this court (Brief, p. 12).

The Court referred to *The Syracuse,* 12 Wall. 167, and *The Wash Gray,* 277 U. S. 66, relied upon by petitioner (Brief, p. 14), and pointed out that those cases involved *towage* (dead vessel—without steam), whereas the instant case was one of a vessel using her own propelling power, saying:

"* * * a distinction may well be taken between a towage contract as such and a pilotage contract. * * * But when the 'assisted vessel' is under her own power and the towing company merely supplies a tug master as a pilot, there is no maritime lien upon the tug for the errors of the pilot (*The Sarnia,* 261 F. 900 (C. C. A. 2)) and no limitation of liability of the tug owner. We can conceive of no reason why the person who merely supplies a pilot should not be able to say to the vessel-owner: 'I will furnish a man believed to be competent but you must assume the risk of his errors'" (R. 88-9).

III.

Argument

Summary of Argument

We shall argue that:

1. The contract between the parties included the "pilotage clause" as one of its terms.

2. The contract was not for "towage" but to *assist* a vessel with steam, *i. e.,* under her own propelling power.

3. The "pilotage clause" is valid.

4. The tug captain (pilot) was the servant of the petitioner pursuant to the terms of the "pilotage clause."

5. The manœuvre was a dangerous one and the accident was not due to negligence.

6. Petitioner assumed the risk of the manœuvre.

FIRST POINT

THERE WAS AN EXPRESS CONTRACT BETWEEN THE PARTIES AND THE "PILOTAGE CLAUSE" WAS PART OF THE CONTRACT.

Both the District Court and the Circuit Court of Appeals found as a fact that the pilotage clause was a part of the contract between petitioner and respondent (R. 78-79, 85-87). This was not disputed on the petition for certiorari.* But it is now disputed (Petitioner's Brief, Point I).

Respondent's schedule of rates, which contains the pilotage clause,† was sent to petitioner on three occasions and admittedly received (R. 86-7).

First, on November 15, 1923, to its office at Philadelphia in answer to petitioner's letter of November 14, 1923 (Exhibits A and B, R. 63).‡

Second, on December 28, 1923, the rate schedule, including the pilotage clause, was mailed to petitioner's office at Marcus Hook, Philadelphia, in answer to petitioner's letter of December 27, 1923 (Exhibits E and F, R. 69-70). The District Court and Circuit Court of Appeals so found (R. 78, 86).

Third, on June 10, 1924, the schedule, including the pilotage clause, was again sent to petitioner at its office at Marcus Hook in answer to petitioner's letter of June 6, 1924 (Exhibits G and I, R. 70, 72). The District Court and Circuit Court of Appeals so found (R. 78, 86).

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* See Petition, Reasons Relied on for the Allowance of the Writ, pages 7-8; also Brief in support of petition, Summary of Argument, pages 11-12.

† Quoted at pages 4-5 of this brief.

‡ On this occasion particular attention was called to the "pilotage clause", the last paragraph of the enclosure (contract and schedule of rates), was marked with the letter X in order that there could be no misunderstanding as to it (Exhibit B, R. 63-4). The District Court so found (R. 78).

Petitioner received further notice of the pilotage clause, which was printed on all of respondent's bill heads, where the clause conspicuously appears on the face of the bill (Exhibits D and H, R. 69, 71). No one with the bill before him could fail to see the clause, any more than one could fail to see the pilotage clause in the schedule of rates (Exhibit C, R. 64). Indeed, petitioner's superintendent (Turnbull) admitted that he had one of respondent's bills with the "pilotage clause" before him when he was questioning the amount of one of respondent's charges for tugboat service, which led to the writing of his letter of June 6, 1924 (Exhibits G and H, R. 70, 71), and he was forced to admit that he saw respondent's invoices "right along".

"Q. Mr. Turnbull, you are familiar with these invoices of *Dalzell's?* A. Yes, sir.

Q. I show you an invoice which was the subject of some correspondence between you and *Dalzell.* I think you will find that that invoice is the subject of that correspondence, referring to your letter of November 26, 1924, marked Exhibit G. Do you remember that? A. Yes sir.

Q. *You see those invoices right along, don't you?* A. Yes, sir" (R. 19).

Although he claimed that he did not remember "reading it" (pilotage clause), he admitted that he had "heard of it" and *"seen it"*. To use his own words:

"Q. Just look at the bottom of this invoice there to which you refer in your letter, where you are quarrelling with the invoice. You had that notice before you at the time you wrote the latter. Do you see the clause at the bottom of the invoice? A. Yes, sir.

Q. What does that say? A. I have read it.

Q. You have read it? A. I have read it now, yes sir. But *I never remember reading it before.*

Q. This is the first time you have ever heard of it, is it not? A. *I heard of it, but it is the first time I have ever seen it to read it"* (R. 20).

"I would not say that I had never seen it (pilotage clause), but I will say that *I never read it"* (R. 22).

Counsel for petitioner assert that the schedule of rates was mailed "to employees of Sun Oil Company (petitioner) in response to their inquiries about towing rates and charges for past towage services" (Petitioner's Brief, pp. 2-3).

By the above statement and following argument petitioner would have this Court believe that only subordinate employees of petitioner had knowledge of the pilotage clause. This is directly contrary to the findings of both the District Court and Circuit Court of Appeals (R. 78-9, 86-7).

Petitioner attempts to avoid the effect of the pilotage clause by asserting that when its marine superintendent telephoned respondent for tugs to assist its steamer to her berth on this occasion, it had nothing to do with the contract between petitioner and respondent, and that the request (offer) to engage tugs was not at the rates quoted in the schedule of rates which petitioner had received from respondent (Brief, p. 11). Then what rates? There was no mention in the telephone conversation as to amount to be paid for the services of the tugs, nor was any request made for a pilot to take charge of the manœuvre (R. 14-15, 85). These and other terms and conditions of the tugboat assistance were contained in the schedule of rates (Exhibit C, R. 64-8).

By this document (and its bill heads) respondent notified its customers of the terms and conditions under which it does business. By ordering tugs after the receipt of notice of these terms and conditions, petitioner assented to these terms and they were incorporated into the oral contract. The procedure followed was not new to any of the individuals involved. It is what petitioner's superintendent, Turnbull "expected" and the same as had occurred on previous occasions (R. 25). There is absolutely nothing in the record concerning any other rates. The *only* rate referred to is the rate given in the contract and each time respondent's charges were

questioned by petitioner, a copy of the schedule of rates (Exhibit C) was enclosed with respondent's reply for petitioner's further information. Indeed, the letters exchanged between petitioner and respondent, concerning respondent's bills for services, clearly show that the charges for services were at the definite rates stated in the schedule (Exhibits A, B, C, E, F, G and I, R. 63-72).

It is a quibble to contend (Petitioner's Brief, pp. 11-12) that petitioner was not notified that the terms of the contract were the *only* terms on which tugs would be furnished. When respondent offered to do business *upon the terms contained in its schedule* of rates and contract, petitioner had no reason to believe that respondent would do business under any other conditions, unless other conditions were later agreed upon. Both the lower courts so found (R. 78, 87).

Notwithstanding the above findings by the District Court and Circuit Court of Appeals, counsel for petitioner still contend that Turnbull had no knowledge that the clause was a condition of his engagement of the tugs, and that there was no meeting of the minds. However, both Courts below have found that petitioner's superintendent (Turnbull) did have knowledge of the clause. As the Circuit Court of Appeals said:

"Whether he (Turnbull) had actually read the clause and whether it was in his mind when he telephoned the order for tugs for the *Sabine Sun* is quite beside the point. The meeting of the minds of the parties to a contract is not determined by a subjective test. Mr. Turnbull's offer on behalf of the libelant, which the respondent accepted, must be interpreted in the sense in which the party using the words should reasonably apprehend that they would be understood by the other party. 2 Williston, Contracts, § 605. Knowing that the respondent had a schedule of rates and a pilotage clause, the importance of which had been stressed not only in the letter of November 15, 1923, but also by printing it on its billheads, the libelant should reasonably apprehend that its

telephone order for tugs would be understood by respondent as a request that they be furnished upon its customary terms as to rates and pilotage. The court below rightly held that the contract between the parties included the pilotage clause as one of its terms" (R. 86-7).

SECOND POINT

THE CONTRACT WAS TO FURNISH TUGS TO "ASSIST" A STEAMER UNDER HER "OWN PROPELLING POWER", NOT FOR TOWAGE.

The courts below found that the contract here was not for "towage" but for "assistance" (R. 88-9).

Towage has recently been defined by this Court in *Stevens* v. *White City*, 285 U. S. 195, as follows:

"The supplying of power by a vessel, usually one propelled by steam, to tow or draw another is towage. Many vessels, such as barges and canal boats, have no power of their own and are built with a view to receiving their propelling force from other sources. And vessels having motive power often employ auxiliary power to assist them in moving about harbors and docks. *Benedict on Admiralty*, 5th ed., § 100" (p. 470).

In *Ryan* v. *Hook*, 34 Hun (N. Y.) 185, the Court said:

"'Tow' means to drag a vessel forward in the water by means of a rope attached to another vessel, and implies that the act is done by those on board of the latter" (p. 191).

The instant case does not involve "towage". There was nothing in the contract, either expressed or implied, that respondent agreed to *tow* petitioner's steamer (*Sabine Sun*). On the contrary, the steamer was admittedly under her own steam, *i. e.*, "making use of her own propelling power" and tugs were furnished to *assist* a steamer which was being operated entirely by her own machinery, viz., her master, officers and crew were at their stations, her own propelling power was being used and she was being steered by her own steering apparatus (R. 25, 29, 32, 86-7).

The contract as customary was made by telephone conversation between petitioner's and respondent's representatives (R. 14, 85). The telephone conversation consisted merely of a request for tugs to *assist* the *Sabine Sun,* under her own steam, to a berth (R. 14-15, 25, 32). Petitioner's superintendent intended the *Sabine Sun* to propel herself through the water by the use of her own propelling power, which intention excludes the possibility of towage. The steamer was able to propel herself to her destination and required no tugs to convey or transport her. What she needed was tug assistance in making turns in the channel and the turn from the channel to her berth, Tugs could, for example, push her sidewise, or push her bow in one direction and her stern in another, in making bends. It was assistance of this kind, not towage, that petitioner ordered.

However, it is apparent that counsel for petitioner have confused a dead ship with a vessel under her own propelling power. Repeated references are made in petitioner's brief to the "towage service" and the "contract to tow or take" (Brief, pp. 9, 10, 11, 12, 21, 28). In the discussion on page 13 following the quotation from the pilotage clause, petitioner omits any reference to the following important words: "which is making use of her own propelling power." This omission is probably in accordance with petitioner's erroneous assumption that this was a "towage" case. That we are right in this is apparent from the fact that in the following paragraph in petitioner's brief (p. 14) reference is made to *The Syracuse, The Wash Gray, The Oceanica,* and other towage cases which do not involve vessels using their own propelling power.

Petitioner's counsel seem to believe that there is no difference between handling a vessel under steam (using her own propelling power) and handling a dead ship (without steam) (Petitioner's Brief, p. 21).

The difference is vital—entirely different principles are applicable. In one case (towage, *i. e.,* handling a vessel without steam) the vessel is without motive power and completely under the control of the towing tug or tugs, and the owner of the vessel towed has a maritime lien on the tugs for damage sustained as a result of any error or negligence on the part of the tug captain in charge.

Sturgis v. *Boyer,* 24 How. 110;
The Express, 52 Fed. 890 (C. C. A. 2);
Central Wharf Towboat Company v. *Furness Withy,* 269 Fed. 950 (C. C. A. 1).

In the other case (with steam) the steamer is in charge of her own movements, *i. e.,* she is using her own propelling power, and is being *assisted* by tugs only when necessary, as ordered from the steamer's bridge, and there is no maritime lien on the tugs for errors of the pilot in charge.

In *The Sarnia,* 261 Fed. 900 (C. C. A. 2) the Court said:

"The tug *Palmer* committed no fault, and when Barrett furnished the *Sarnia* with a pilot in the person of Capt. Slauer, he did not thereby promise a maritime lien on his tug for whatever errors Capt. Slauer might commit while standing on the *Sarnia's* bridge and managing that steamer *with her own steam*" (p. 901).

Where the vessel is "with steam" the "pilotage clause" is applicable; where "without steam" it is a case of towage and the clause is not applicable.

As the Circuit Court of Appeals said:

"But when the 'assisted vessel' is under her own power and the towing company merely supplies a tug master as a pilot, there is no maritime lien upon the tug for the errors of the pilot [*The Sarnia,* 261 F. 900 (C. C. A. 2)] and no limitation of liability of the tug owner" (R. 89).

Whether or not a lien arises is of real importance. In the case of a tow without her own propelling power, a lien arises

and the marine insurance on the tug protects the tug owner. Where the steamship uses her own propelling power and no lien arises for the pilot's negligence, the tug owner's marine insurance does not protect him. This practical business consideration is the reason for the existence of the "Pilotage Clause". The tug owner cannot afford, uninsured, to take the risk. The possible damages involved are too tremendous and as the Circuit Court of Appeals pointed out, the tug owner might be wiped out by one accident (R. 89).

It will be seen, therefore, that the situation is not analogous to and has nothing in common with the "towage" cases such as *The Syracuse,* 12 Wall. 167, *The Wash Gray,* 277 U. S. 66, and the other cases referred to in petitioner's brief (pp. 14-21). In those cases, the vessels were not being navigated—they were *without steam* and not using their own propelling power—they were entirely under the control of the towing vessel, viz., they were being towed. In the instant case, petitioner's steamer at no time was being towed; she was at all times using her own propelling power. The tugs were not there to *tow* but to *assist* the steamer as ordered from the steamer's bridge by the pilot in charge (R. 25, 46-7, 88-9).

Nor is *The Georgia,* 31 F. (2d) 759 (Petitioner's Brief, p. 22), in point. In that case the steamer (under her own steam) was passing through Blackwell's Canal into the Great Lakes. A tug was engaged to *lead* the steamer through the canal. While so proceeding, led by the tug, the steamer was jammed between vessels moored on one side of the canal and the other bank. The owner of the steamer (libellant) claimed that the tug was at fault for

"leading the *Wickwire* (steamer) into a position where the width and depth of the channel were insufficient to permit her to pass between the *Toledo* and the invisible channel; * * *" (p. 760).

The Court held the tug at fault in this respect, saying:

"I find the steamtug *Georgia* was primarily and solely at fault for the wedging in question and resulting damage, * * *" (p. 761).

The question in the instant case was not even before the Court, as there is no contention here that any of the tugs assisting the *Sabine Sun* was guilty of fault (Petitioner's brief, p. 2).

It is also argued in behalf of petitioner that the agreement to furnish tugs to assist the *Sabine Sun* to Bayonne was really a contract to transport; that the service was towage notwithstanding the steamer's engines and steering apparatus were operated by her crew, and that the steamer's engines were "assisting the towing company" (Brief, pp. 21, 22).

If the ship's engines are to be considered as assisting the towing company, does the towing company pay for the fuel oil consumed? Would the vessel owner keep steam up and use its own fuel oil at its own expense if it were the towing company's task to provide the propelling power? The answers to these questions are necessarily in the negative.

It must be conceded that the steamer was either being towed or she was under her own steam. In other words, it is either a case of towage or a vessel using her own propelling power. It cannot be both. She certainly had steam on her engine and was "making use of her own propelling power", which brings her directly within the wording of the "pilotage clause" and the situation intended to be covered by that clause (R. 25, 32, 34).

Petitioner even suggests (Brief, p. 22) that respondent did not appreciate the difference between "assisting" and "towing". Petitioner is mistaken. Respondent's contract provides for charges at a different rate for the two classes of

service. One for "docking and/or undocking vessels" (with steam) and another for "transporting vessels" (towage) (R. 64-5). Petitioner knew this, as appears from the bills (Exhibit D). For example, on October 11, 1923, the charge with reference to the *Sabine Sun* "no steam" was at the rate of $12.50 per hour, and on October 14 the charge with respect to the *Sabine Sun* "with steam" was $30 per tug (R. 68-9).

Furthermore, it is a matter of common knowledge that in situations of this kind the assisting tugs invariably attend either alongside or nearby the steamer until she arrives in the vicinity of her pier or the assistance of the tugs otherwise becomes necessary.

In *The Energy-Altamaha,* 1926 A. M. C. 917 (not reported in Federal), Ward, *J.,* said:

"The steamer was *under her own steam* and *attended* by the tugs *F. B. Dalzell* and *E. S. Atwood,* the master of the latter being on the bridge and in charge of the navigation" (p. 918) (italics ours).

In *The Wireless No. 1,* 290 Fed. 239, the Court said:

"* * * the steamer *West Henshaw,* which was moored at the south side of Morgan Street dock, backed out *under her own steam, assisted* by the steamtug *Nonpareil* on the port bow and the steamtugs *A. H. Mills* and *Anna J. Brooks* on the port quarter" (p. 240) (italics ours).

Petitioner goes one step further and after referring to the towage cases, makes the following statement:

"In the case at bar respondent agreed, at petitioner's request, to take the *Sabine Sun* to Bayonne. This constituted a contract to furnish tugs and crews, with a competent man in charge, and to use reasonable care to move the vessel. It is what both this Court and the Circuit Court of Appeals for the Second Circuit have classed as a towage service" (Petitioner's Brief, p. 19).

In support of the above statement petitioner refers to *Sacramento Navigation Co.* vs. *Salz,* 273 U. S. 326, 328, and *The Mercer,* 297 Fed. 981. Neither of these cases is in point. They are distinguished at pages 24-25 of this brief.

In no case cited by petitioner has this Court or the Circuit Court of Appeals for the Second Circuit "classed" an agreement such as that before this Court as towage.

THIRD POINT

THE PILOTAGE CLAUSE IS VALID AND RELIEVED RESPONDENT FROM LIABILITY FOR DAMAGES SUSTAINED AS A RESULT OF THE STRANDING.

Petitioner gives no cogent reason for holding that petitioner and respondent were not free to make the contract which both Courts below found that they had made. A tug or a towboat company is not a common carrier. *The Steamer Webb,* 14 Wall. 406; *The Margaret,* 94 U. S. 494; *Transportation Line* v. *Hope,* 95 U. S. 297; *Graves* v. *Davis,* 235 N. Y. 315.

It is well established that parties dealing at arms length and free to contract or not, may provide against liability for negligence. In *Wells Fargo & Co.* v. *Taylor,* 254 U. S. 175, this Court held valid a contract whereby an express messenger released his employer, Wells Fargo & Company, and the railroad on which he worked, from liability for negligence, saying:

"There being no statute regulating the subject, it is settled by the decisions of this court, and is recognized in other jurisdictions, that the messenger's agreement was a valid and binding contract whereby Taylor agreed to assume all risk of injury incident to his employment, from whatever

cause arising, assented to the contractual arrangement between the two companies in respect of such injuries, and became obligated to the express company to refrain from asserting any liability against it or the railroad company on account of any such injuries" (pp. 188-9).

This Court reached the same conclusion concerning a contract between a railroad and a construction company in *Santa Fe Rwy.* v. *Grant Brothers,* 228 U. S. 177; again with respect to a lease between the owner of a cold storage warehouse and a railroad in *Hartford Fire Insurance Co.* v. *Chicago, Milwaukee & St. Paul Rwy. Co.,* 175 U. S. 91; and with respect to an express messenger in *Baltimore & Ohio, etc., Rwy.* v. *Voigt,* 176 U. S. 498. In *McCormick* v. *Shippy,* 124 Fed. 48 (C. C. A. 2) referred to by this Court in *Santa Fe Rwy.* v. *Grant Brothers, supra,* at page 192, the Circuit Court of Appeals said, with respect to a clause in the charter of a yacht which provided "that the charterer shall assume no responsibility for loss or damage to the yacht":

"There is no question of public policy involved in this charter party, as in the case of a common carrier. It is well settled that the parties in such a case have the right to provide by apt language against liability for negligence" (p. 51).

No reason of public policy requires that the pilotage clause be declared invalid. Indeed, public policy requires that the right to contract freely be maintained. In *Baltimore & Ohio, etc., Rwy.* v. *Voigt,* 176 U. S. 498, this Court said:

"At the same time it must not be forgotten that the right of private contract is no small part of the liberty of the citizen, and that the usual and most important function of courts of justice is rather to maintain and enforce contracts, than to enable parties thereto to escape from their obligation on the pretext of public policy, unless it clearly appear that they contravene public right or the public welfare. It was well said by Sir George Jessel, M. R., in *Printing &c. Co.* v. *Samp-*

son, L. R. 19 Eq. 465: 'It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract'" (pp. 505-6).

The reasons usually advanced for declaring invalid a provision in a contract whereby one party seeks release from liability for his negligence are two-fold, first, that such a release is an incentive to negligence, and second, with respect to carriers, that the parties do not deal on an equal footing. But the "pilotage clause" is no incentive to negligence because individual liability of the pilot for his own negligence remains and is a sufficient incentive to due care on his part. In *The China,* 7 Wall. 53, this Court said with respect to a pilot:

"If there be any default on his part, the owner has the same remedies against him as against other delinquents on board" (p. 67).

Furthermore, petitioner and respondent dealt at arms length on an equal footing. Respondent had no monopoly of the tug boat business in New York harbor and petitioner was free, if it chose, to engage tugs from a number of other companies, or if it desired, to attempt to negotiate a special contract with respondent. Furthermore respondent, not being a common carrier, was entitled to refuse to do business expect on its own terms, which terms as both courts below have found, included the pilotage clause.

In *Santa Fe* v. *Grant Brothers,* 228 U. S. 177, this Court said:

"The parties then were free to make their own bargain as to this transportation and the liability which would attach to it. There is no rule of public policy which denies effect to their expressed intention, but on the contrary as the matter lies within the range of permissible agreement, the highest public policy is found in the enforcement of the contract which was actually made" (p. 188).

There is no principle of law which forbids an employer (respondent here) from informing parties with whom it contracts (petitioner here) that its servants are acting beyond the scope of their employment if and when they assume duties beyond the border of the property owned by respondent, and that its general servants are not its servants for the performance of particular acts, and that if its general servants undertake to perform such particular acts, they become for that purpose the servants of petitioner.

Standard Oil Co. v. *Anderson,* 212 U. S. 215, 220;
Denton v. *Yazoo & Miss. Valley Rld. Company,* 284 U. S. 305.

As the Circuit Court of Appeals said:

"We can conceive of no reason why the person who merely supplies a pilot should not be able to say to the vessel-owner: 'I will furnish a man believed to be competent but you must assume the risk of his errors.' If this cannot be done, the piloting company may readily be wiped out by a single disaster" (R. 89).

The pilotage clause was first passed upon (and upheld) in *The Nonpareil,* 1924 A. M. C. 312 (S. D. N. Y.).* The Court said:

"All harbor towing in this port of steam vessels *with steam* up is done on these terms * * *" (p. 318).

* Not reported in Federal Reporter.

The clause has since been upheld in the following cases:

The Wireless No. 1, 290 Fed. 239 (E. D. N. Y.);

The Niels R. Finsen, 52 F. (2) 795 (S. D. N. Y.);

The Hagood, 1925 A. M. C. 1646 (S. D. N. Y.)*;

The Energy-Altamaha, 1926 A. M. C. 917 (S. D. N. Y.)*;

McGirr's Sons v. *Mutual,* 1927 A. M. C. 382 (S. D. N. Y.)*;

The Watertown-Oran, 1930 A. M. C. 1523 (S. D. N. Y.)*;

Lee & Simmons Inc. v. *Peursum,* 1931 A. M. C. 699 (E. D. N. Y.)*;

Foreign Transport Co. v. *Moran, (The Margaret A. Moran),* 57 F. (2d) 143 (C. C. A. 2).**

In *The Pacific Maru,* 8 F. (2d) 166 (S. D. Ga.), a much broader clause than the one before this Court was passed upon and upheld, following an admirable discussion of the cases. The Court said:

"So far as is disclosed, the contracts containing such exemptions have worked satisfactorily in the commerce of the country for many years, and this court would be bold indeed to declare such a practice against public policy, in the face of such record and of the inaction of the states and of the Congress. The contract of exemption from liability is valid. There was no need to offer an alternative contract at a different rate. Such requirement would violate the freedom of contract" (p. 173).

Counsel for petitioner rely upon *The Wash Gray (Compania de Navegacion* v. *Firemen's Fund Insurance Company),* 277 U. S. 66, and *The Syracuse,* 12 Wall. 167 (Brief, p. 14).

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* Not reported in Federal Reporter.

** The District Court decision is referred to at page 41 of petitioner's brief under the name *Allaguash,* 1930 A. M. C. 1981, the case was reversed by the Circuit Court of Appeals (57 F. (2d) 143).

In each of these cases the vessel towed was without her own propelling power—the pilotage clause was not involved. In *The Wash Gray,* the steamship *Freeport Sulphur No. 1* engaged to *tow* a tugboat (*Wash Gray*) from Tampico to Galveston. The contract provided:

"*Freeport Sulphur No. 1* will furnish hawser. All other risk and expense to be borne by the tug. It is understood you will keep sufficient men on board to keep up steam and man the tug's pumps. *S. S. Freeport No. 1* is not responsible in any way for loss or damage to the *Wash Gray*" (p. 73).

During the voyage, the tug (*Wash Gray*) was lost and her owners sued the *Wash Gray's* hull underwriters, who defended on the ground that the contract above quoted discharged them from liability on their policies because it was a fact material to the risk which had not been disclosed. The theory of the underwriters was that the contract exonerated the towing vessel from liability for her own negligence. This Court held that the contract (as drawn) did not release the towing vessel from liability for loss or damage to the *Wash Gray* due to the negligence of the master or crew of the towing vessel.

Concerning the *The Wash Gray,* the Circuit Court of Appeals said in the instant case:

"If the opinion lays down only a rule of construction, it is too clear for argument that it does not apply to the pilotage clause in suit which indubitably expresses the intention to put upon the 'assisted vessel' the risk of the pilot's handling of her. If, on the contrary, the opinion lays down the rule that a towing vessel cannot release herself from liability for negligence, however clearly that intention be expressed in the contract of towage, a distinction may well be taken between a towage contract as such and a pilotage contract" (R. 88-9).

The Syracuse, 12 Wall. 167, involved a *towage* contract under which the owner of the tug agreed to bear the risks

of navigation, provided the steamboat which furnished the propulsive power was navigated with ordinary care and skill (p. 170). This Court held that the steamboat was not navigated with ordinary care and skill and she was held at fault.

Petitioner would have the Court believe that the "pilotage clause" now before this Court (or a similar clause) has been held invalid by this Court and by other Courts (Petitioner's Brief, p. 16). This is not the fact. The "pilotage clause" before this Court has actually been passed upon *only* in the cases referred to at pp. 21-2 of this brief, and in each case it has been upheld.

In *Calzavaro* v. *Planet S. S. Corp.,* 31 F. (2d) 885 (C. C. A. 4) (Petitioner's Brief, pp. 15, 19), the contract between the parties included a similar clause, but the steamer was *not* under her own propelling power and the clause was *not* passed upon.

In *British Columbia* v. *Mylroie,* 259 U. S. 1 (Petitioner's Brief, pp. 18, 19), the parties agreed that the tug would render the barge "reasonable assistance from time to time in any emergency which might arise" and that the tug company "is not to be held liable for any damage which might happen to the said barge, *Bangor,* or its cargo, while in tow or at anchor" (p. 11). This Court held that the clauses of the contract seemed to be in conflict. They were reconciled by holding that the tug was not liable unless she should fail to render reasonable assistance to the tow in an emergency, and it was found that the tug did not render the assistance as required by the contract. This Court said:

"This makes it unnecessary for us to consider the contention on behalf of the barge that the exemption clause is void" (p. 12).

Sacramento Navigation Co. v. *Salz,* 273 U. S. 326 (Petitioner's Brief, pp. 19, 21) is an affreightment case, involving

the Harter Act. The sole question was "whether the barge alone or the combination of tug and barge was the 'vessel transporting' the barley, within the meaning of the Harter Act" (pp. 327-8). *The Mercer,* 297 Fed. 981 (Brief, p. 19) is a salvage case and involves only the question whether services rendered to a vessel in need of assistance was salvage or towage.

All the other cases referred to in petitioner's brief (pp. 14-20) involved *towage,* viz., vessels *not* using their own propelling power, and, therefore, did not involve the pilotage clause.*

As for towage (not involved here), the situation is clearly stated by the Circuit Court of Appeals (R. 87-8). For the cases where the Courts have held that the tug owners may restrict their liability by special agreement, see:

The Oceanica, 170 Fed. 893 (C. C. A. 2); certiorari denied, 215 U. S. 599;

Ten Eyck v. *Director General,* 267 Fed. 974 (C. C. A. 2); certiorari denied, 254 U. S. 646;

Monk v. *Cornell Steamboat Company,* 198 Fed. 472 (C. C. A. 2);

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* The cases are: *The Steamer Syracuse* (1870), 12 Wall. 167, 171; *Compania de Navigacion* v. *Firemen's Fund Insurance Co.* (1928), 277 U. S. 66, 73-4; *The M. J. Cummings* (1883, N. D. N. Y.), 18 Fed. 178; *The American Eagle* (1893, D. C. Ohio), 54 Fed. 1010; *The Jonty Jenks* (1893, N. D. N. Y.), 54 Fed. 1021, 1023; *The Somers N. Smith* (1903, D. C. Me.), 120 Fed. 569, 576; *In re Moran* (1903, E. D. N. Y.), 120 Fed. 556, 558; *Alaska Commercial Co.* v. *Williams* (1904 C. C. A. 9 C.), 128 Fed. 362, 366; *The Edmund L. Levy* (1904 C. C. A. 2 C.), 128 Fed. 683, 684; *The Oceanica* (1906 W. D. N. Y.), 144 Fed. 301, 305; 170 Fed. 893; *The Monarch* (1916 D. C. Fla.), 235 Fed. 795; *Mylroie* v. *British Columbia Mills Tug & Barge Co.* (1920 C. C. A. 9 C.) 268 Fed. 449, 259 U. S. 1; *The Sea Lion* (1926 D. C. Cal.), 12 F. (2d) 124; *United States* v. *Norfolk-Berkley Bridge Corp., et al.* (1928 E. D. Va.), 29 F. (2d) 115, 118; *Graves* v. *Davis,* 235 N. Y. 315; *Ten Eyck* v. *Director General,* 267 Fed. 974; *The John G. Stevens,* 170 U. S. 113; *The Margaret,* 94 U. S. 494; *The Vim,* 40 F. (2d) 638.

Owen McCaffrey's Sons v. *Director General,* 282 Fed. 728 (S. D. N. Y.);
McCormick v. *Shippy,* 124 Fed. 48 (C. C. A. 2);
Long v. *Lehigh Valley Railroad Co.,* 130 Fed. 870 (C. C. A. 2).

In *Graves* v. *Davis,* 235 N. Y. 315, the New York Court of Appeals so held, saying:

"A tug is not a common carrier of the tow. The owners of a tug may restrict their liability by special agreement. No rule of public policy is involved. (*Wells & Tucker* v. *Steam Nav. Co.,* 2 N. Y. 204; *The Margaret,* 94 U. S. 494; *Hartford Fire Ins. Co.* v. *Chicago M. & St. P. Ry. Co.,* 175 U. S. 91, 98, 99). When the defendant gave notice on what terms it would furnish tug service, the charterer actually accepted such terms and entered into a special contract incorporating them when it ordered tow service without protest" (pp. 319-20).

FOURTH POINT

THE TUG CAPTAIN (PILOT) WAS THE SERVANT OF PETITIONER PURSUANT TO THE TERMS OF THE PILOTAGE CLAUSE.*

Respondent did not furnish a pilot to take charge of petitioner's steamer. It is not even contended by petitioner that

* It is interesting to observe the difference between the position taken by petitioner in the petition and brief for writ of certiorari, and the position now taken on this point. In the brief in support of the petition for writ of certiorari petitioner said:

"The two tug captains were respondent's servants before they took charge of the movement of the *Sabine Sun* pursuant to respondent's contract" (p. 18).

In the brief now on file the sentence reads:

"The two tug captains were respondent's servants before they took charge of the movement of the *Sabine Sun*" (p. 24).

The words "pursuant to respondent's contract" are omitted. Apparently these words were omitted in order that petitioner could justify Point I of its present brief (pp. 10-12), which was not part of petitioner's case upon the application for writ of certiorari.

its superintendent ordered a pilot—he merely ordered tugs (R. 14, 25, 29-30, 85-6). There was no agreement on the part of respondent to furnish a pilot, and the "pilotage clause" of the contract is an express repudiation of any such intent. Respondent furnished tugs to *assist* the steamer and by the "pilotage clause" made it clear that it was beyond the scope of the employment of the tug captain to leave his tug and go aboard a steamer using her own propelling power and take charge. However, it was expressly provided that *if* the captain *did* leave his tug and go aboard the steamer, he became the servant of petitioner in respect to giving orders and handling the steamer (R. 67-8).

For the convenience of the Court we quote the part of the pilotage clause pertinent to the discussion under this point:

"When the captain of any tug furnished * * * goes on board the said vessel * * * it is understood and agreed that said tugboat captain * * * becomes the servant of the owners of the vessel assisted * * *" (Exhibit C, R. 67-8).

Petitioner contends that the relationship of master and servant did not exist because petitioner did not "choose" the pilot, and further, because the pilot went on the steamer's bridge "without consulting or being requested by petitioner," and one pilot was substituted for another during the voyage without consulting petitioner (Petitioner's Brief, pp. 24-25, 27).

This contention overlooks, certainly disregards, the facts, viz., it was necessary to have one pilot succeed the other, because the first pilot was not familiar with nor licensed for the waters further on (R. 47-8). As for choosing the pilot and requesting him to come on board petitioner's steamer, petitioner's superintendent (Turnbull) was in full charge

of the whole operation and admitted that he "expected" the tug captain (Fort) to come on board and act as pilot without being requested (R. 14, 24-5). There was no mystery about the matter and there was no reason for consultation as to the pilot. As the Circuit Court of Appeals said:

"Nothing was said about pilotage, but Mr. Turnbull (petitioner's superintendent) understood that his vessel would move under her own steam and that one of the tugboat captains would come upon her bridge and take charge as pilot. The parties had previously done business together, * * *" (R. 85-6).

Indeed, there could be no other conclusion from Turnbull's testimony. It is as follows:

"Q. Then you knew what the manœuvre was going to be, did you not? A. Yes sir.

Q. And that is what you came to New York for, was it not? A. Yes sir.

Q. About how many times before or since have you been on steamers in New York and proceeded with the vessel from anchorage ground or some other place to destination? A. That is very hard to answer.

Q. Well, about? A. Probably half a dozen times.

Q. Were they always under their own steam, as this vessel was? A. Yes sir.

Q. Always under their own steam? A. Yes sir.

Q. And did always a tugboat captain act as pilot and take charge? A. Yes sir.

Q. Always? A. Always.

Q. You knew this was going to occur on this occasion? A. Yes sir.

Q. It was not necessary for you to request one of the tugboat captains to act as pilot, was it? A. No sir.

Q. You expected that? A. Yes sir.

* * * * * * *

Q. This particular manœuvre was made in the same manner as other manœuvres had been made? A. Yes sir.

Q. As far as other tugboat captains coming on board and taking charge was concerned? A. Yes sir" (R. 24-5).

Petitioner's steamer was required to have a pilot to direct her navigation through the Kills and to her berth. The pilot could be anybody licensed to pilot in the waters traversed. He might be the ship master (which would be the case if he had a license for the waters), a Sandy Hook pilot,* a coast pilot, or any outside tug captain holding a proper license.

When Fort went on the steamer's bridge to act as pilot he became petitioner's servant under the pilotage clause, and if some question arose as between him (Fort) and petitioner, it was a matter to be disposed of between them, not between petitioner and respondent.

In *Standard Oil Company* v. *Anderson,* 212 U. S. 215, this Court said:

"One may be in the general service of another, and, nevertheless, with respect to particular work, may be transferred, with his own consent or acquiescence, to the service of a third person, so that he becomes the servant of that person with all the legal consequences of the new relation" (p. 220).

"It sometimes happens that one wishes a certain work to be done for his benefit and neither has persons in his employ who can do it nor is willing to take such persons into his general service. He may then enter into an agreement with another. If that other furnishes him with men to do the work and places them under his exclusive control in the performance of it, those men become *pro hac vice* the servants of those to whom they are furnished" (p. 221).

Fort, while on the bridge of the *Sabine Sun* was under the exclusive control of the master of that vessel and petitioner's superintendent, both of whom were present. The master could have supplanted Fort at any moment, temporarily by countermanding any individual order, or permanently by directing Fort to leave the bridge. No representative of

* "* * * * A Sandy Hook pilot (Compulsory under Sec. 2119, c. 410, Laws of New York, 1882; *Homer Ramsdell Co.* v. *La Compagnie General Transatlantique,* 182 U. S. 406)".

respondent was present to direct Fort in the manner of doing the work or to instruct him whether or not he should proceed or stop.

In *The China,* 7 Wall. 53, this Court said with reference to a "compulsory" pilot,

"The master has the same power to displace the pilot that he has to remove any subordinate officer of the vessel. He may exercise it or not, according to his discretion" (p. 67).

See also:

Dampskibsselskabet Atalanta A/S et al. v. *United States,* 31 F. (2d) 961 (C. C. A. 5);

City of Los Angeles v. *Standard Transp. Co.,* 32 F. (2d) 988 (C. C. A. 9);

Robins Dry Dock & Repair Co. v. *Navigazione Libera Triestina, S. A.,* 32 F. (2d) 209 (C. C. A. 2);

Jure v. *United Fruit Company,* 6 F. (2d) 6 (C. C. A. 5).

In similar circumstances in *City of Los Angeles* v. *Standard Transp. Co., supra,* 32 F. (2d) 988 (C. C. A. 9), the court held that a pilot furnished by the City of Los Angeles became the servant of the owners of the steamship of which he took charge, even in the absence of a pilotage clause. In discussing how it determined whose servant the pilot was, the Court said:

"* * * The pilot was placed in charge of the *Seekonk* by the master and not by the law, and the rights and obligations of the parties must be determined by reference to the relation thus established. In the varied affairs of life it is not always easy to determine where responsibility rests for the act of a servant in the general service of one master but employed in the particular work of another. But the test almost invariably applied is: Whose was the work, and whose the power of control? *Guy* v. *Donald,* 203 U. S. 399, 27 S. Ct. 63, 51 L. Ed. 245; *Standard Oil Co.* v. *Anderson,*

212 U. S. 215, 29 S. Ct. 252, 53 L. Ed. 480. While here, the pilot was in the general employ of the city, the work in which he was immediately engaged was the work of the ship or master, and the only control to which he was subject was the control of the master. The city was powerless to direct him in the discharge of his duties and was not present to discharge him from the particular service in case of negligence or incompetence" (p. 990).

So here, the work of navigating the ship was the work of the master of the ship and Fort, while on the bridge, was doing the master's work with the master's consent because he did not interfere. Respondent was powerless to direct Fort in the discharge of his duties and was not present to discharge him from the service in case of negligence or incompetence. Petitioner's shipmaster was present, however, and empowered by law to supplant Fort at will.

Although agreeing with the Court below that a "person who merely supplies a pilot" can "exempt himself from liability for the negligence" of the pilot so supplied, petitioner contends that this was "not merely a contract to supply a pilot", but "a contract to *move* a vessel with the aid of tugs, * * *" (Petitioner's Brief, p. 27).

But this was a contract to furnish tugs to *assist* a vessel "making use of her own propelling power" and manned by her own master, officers and crew as we have shown under Point II. As usual under the circumstances, one of the tug captains boarded the steamer and acted as pilot. It was for this reason that the "pilotage clause" was made a part of the contract between the parties *i. e.,* by the "pilotage clause", the towboat company represents to the steamship owner that it is beyond the scope of the employment of the tug captain to leave his tug and go aboard a steamship "using her own propelling power" and take charge, and a tugboat captain, who *does* leave

his tug and goes aboard a steamship "using her own propelling power" and takes charge, becomes the servant of the owners of the steamship for that purpose.

As the Court below (C. C. A.) said:

"The appellant (petitioner) argues that, even if the pilotage clause was a term of its contract with respondent, the case at bar was not brought within it, but the argument is wholly without merit. It is mentioned merely to indicate that it has not been overlooked" (R. 87).

That the pilot was petitioner's servant is further evidenced by the fact that petitioner paid him $15 for his services as pilot (R. 37).

Nor was this payment a mere gratuity, as contended by petitioner, citing *The Edward G. Murray,* 278 Fed. 895; *The Procida,* 243 Fed. 251, and *The Caspian,* 14 F. (2d) 1006 (Petitioner's Brief, p. 31). The "pilotage clause" was not involved in any of those cases. Respondent made no charge for the services of any pilot. In every instance respondent's charge was "per tug" (Exhibit C. R. 64-7).

The situation is precisely the same as in *Oriental Navigation Co.* v. *S. S. Watertown* (*The Oran*), *supra,* where the Court said:

"There was no written contract between the companies, and the agreement must be spelled out from the testimony, to which reference had been made, and from the usual practice in this harbor in similar transactions.

"In the case of the *Nonpareil,* 1924, A. M. C. 312, 318, Judge Ward said that

> 'All harbor towing in this port of steam vessels with steam up is done on terms'

substantially similar to those set out on the Olsen schedule of rates, as hereinabove quoted, and the Captain of the tug in charge of the operation is the agent of the owners of the steamer. Such, indeed, was the stipulation of the parties in the *Nonpareil*" (pp. 1524-5).

FIFTH POINT

THE PILOT (TUG CAPTAIN) WAS NOT NEGLIGENT

The pilot, Captain Fort, captain of the tug *Fred B. Dalzell, Jr.*, had been piloting steamers in and out of Newark Bay for many years and was familiar with the channel around Bergen Point and the ranges (R. 37-9). No question is raised by petitioner as to his experience and competency as a pilot in the waters where the stranding occurred but he is charged with negligence because he failed to succeed. In making this charge petitioner overlooks the conditions which existed in the vicinity at the time and the danger of the manœuvre, as we shall show. Furthermore, counsel for petitioner have erroneously stated the law applicable. They assert that pursuant to the undertaking in the instant case,

"the law imposed a duty on it (respondent) not to cause injury to the *Sabine Sun*, either through its tugs, captains, or crews" (Brief, p. 8).

In the following paragraph of petitioner's summary another misstatement of the law will be found. It is as follows:

"The man furnished by respondent to take charge was bound to know * * * how to direct the movements *successfully.*"

On the following page (paragraph numbered 6) petitioner asserts that the law

"imposes upon a towing company a duty not to cause injury to the vessel which it has contracted to transport from one place to another " (Brief, p. 9).

As we have shown, this is not a case of towage, but even if it was, the above are not correct statements of the law

applicable to towage, which has been recently restated in *Stevens* v. *White City,* 285 U. S. 195, 1932 A. M. C. 468, where this Court said:

"Decisions of this Court show that under a towage contract the tug is not a bailee of the vessel in tow or its cargo. And it is established here and by numerous rulings of lower federal courts that evidence showing a tug's receipt of a tow in good order and delivery in damaged condition raises no presumption of negligence.

* * * * * * *

"While respondent was not an insurer or liable as a common carrier, it owed to the owner of the *Drifter* the duty to exercise such reasonable care and maritime skill as prudent navigators employ for the performance of similar service. The burden was upon petitioner to show that the loss for which he sought recovery was caused by a breach of that duty. The mere fact that the *Drifter* was in good order when received by respondent and in damaged condition when delivered does not raise any presumption of fault" (p. 202).

DANGER OF THE MANŒUVRE

The manœuvre was a difficult task at this particular time, because blasting and dredging was going on in the vicinity; there were drills in the way; the channel was not marked, and there were no reliable charts of the vicinity in its then condition. At the time of this accident there was so much work of blasting and dredging going on in the vicinity that the United States Engineers would not vouch for the Government charts. There were no aids to navigation and the only guide for navigating was the natural ranges on the adjacent land, which the pilot used, to wit: a gas tank and Street on Staten Island, the ranges he had used before and since without mishap (R. 33-4, 37-8, 40).

Because of the danger due to local conditions the tug captain (pilot) took soundings in the vicinity of Bergen

Point on the day before. He also called upon the U. S. Army Engineers and made every effort to obtain the latest information concerning the deepest water in the vicinity and the obstructions on the bottom (R. 33, 35, 42-3, 76). As Captain Fort testified:

"It always has been a very difficult channel to navigate from Port Richmond up to the light, or if you go down the Sound to Shooters Island. It is narrow, rocky on both sides and treacherous tides. They were dredging and mud digging, and there were drills in the way, and tows to meet, and a very narrow space to navigate the vessel. * * * You had very few channel markings there, some of the channels were not marked at all. * * * There was no reliable chart of that district from Port Richmond up, because the engineers would give us a chart, but they would not vouch for it, they would say that that was the best they could do" (R. 33).

The expert called in behalf of petitioner admitted that there were no aids to navigation established by the Government and that it was necessary to "use your own". He testified:

"Q. You didn't do your navigation by any aids established by the Government? A. Well, no.
Q. There weren't any? A. No.
Q. You had to use your own? A. Yes" (R. 59-60).

We do not know how many other vessels struck obstructions in this vicinity while the blasting and dredging operations were going on, but the record shows nine other casualties, and in each case the vessels were in charge of experienced pilots. The steamships *Franklin K. Lane* and *Cerro-Azul,* also Captain Reynolds, an experienced pilot (name of steamer not given) "struck something two or three times in the vicinity"; Captain Slauer, another experienced pilot, had misfortune there; also Captain Rex, and another pilot whose name the Court stenographer omitted to transcribe (R. 57).

Indeed, petitioner's expert, Fountain, admitted "the same thing might happen to me", "maybe I have been lucky" (R. 57).

In the last analysis, therefore, there is only one fair conclusion and that is that the pilot of the *Sabine Sun* did his best with what he had, but this accident occurred in spite of his efforts, just as other experienced pilots in charge of other steamers navigating these same waters under these conditions struck obstructions on the bottom at about the same place.

Although conceding that the *Sabine Suns'* pilot on this occasion took "preliminary precautions" to ascertain the best way to get the vessel in under the conditions, petitioner now asserts that he "made no use of" these precautions and proceeded to navigate by some "haphazard" shore range, and that "no excuse" was made for his manœuvre (Petitioner's Brief, pp. 34, 35).

But the so-called "hapzard" shore range was the same one used by petitioner's expert. In other words, because of the absence of Government aids to navigation and reliable charts, these pilots were forced by conditions to "use their own", and they were using the same range (R. 33-4, 36-8, 59-60).

Petitioner's counsel now assert that "there is not a scintilla of evidence that any of the alleged difficulties contributed to the stranding of the *Sabine Sun*". They even criticise the pilot's testimony that the chart of the vicinity was not reliable, asserting "there is no evidence of this other than his bare statement" (Brief, p. 36). Well, why did not they produce testimony that the chart *was* reliable? Their own expert agreed that there were no Government aids to navigation, that he had to rely upon shore ranges of his own choosing, *i. e.*, "use his own", and that he was

"lucky" that the same thing had not happened to him (R. 57, 59).

Indeed, we submit that the fact that 8 or 9 other steamers, in charge of competent pilots, struck in this vicinity is a real illustration of the difficulties and dangers to be encountered in the vicinity at that time.

In *The Primrose,* 42 F. (2d) 827 (C. C. A. 2) (Petitioner's Brief, p. 37), the Court said:

"The evidence showed frequent groundings of various barges in attempts to navigate and the grounding and injury of Mignaults barge *No. 6* at practically the same place where *No.* 7 got into trouble. In such circumstances there is not the usual probability arising from a stranding that the Cornell tug was towing her barge negligently and taking her outside the channel as marked" (p. 828).

See also

United States v. *Jacksonville Co.,* 18 F. (2d) 39 (C. C. A. 5).

We have therefore an admittedly "dangerous" place where several other steamers, in charge of competent pilots, have had accidents because of the blasting and dredging going on and failure of the Government (up to that time) to provide aids to navigation or reliable charts of the vicinity. Clearly this is not a case to condemn a pilot who used all reasonable precautions to bring through his ship safely. Courts of admiralty often have stated their unwillingness to substitute the Court's opinion, with regard to precautions to be taken, for the opinion of an experienced navigator who is on the spot and who is charged with the duty of acting under conditions which he sees and which the Court cannot see.

In determining whether the pilot used reasonable skill and care, we must, as said in *The Harold,* 287 Fed. 757, "put our-

selves in his place, and divest ourselves of the knowledge that comes after the event" (p. 758).

In *The Eli B. Conine,* 233 Fed. 987, (C. C. A. 2) the Court said:

"'Lack of care under the circumstances', which is negligence, is rarely willful or reckless; it is usually error of judgment. But the converse is not true—that every error of judgment is negligence. The error must be measured by the standards of conduct and business knowledge furnished by the evidence and by experience of which even courts can take cognizance without direct testimony. If the error, viewed from that standpoint, is such as would not have been committed by a reasonable man, reasonably skilled in his occupation, it is negligence" (p. 988).

In *The Clarence L. Blakeslee,* 243 Fed. 365, (C. C. A. 2) the Court said:

"Navigators are not to be charged with negligence, unless they make a decision which nautical experience and good seamanship would condemn as unjustifiable at the time and under the circumstances shown. *The Nannie Lamberton,* 85 Fed. 983, 29 C. C. A. 519. The line of demarcation between error of judgment and negligence is indicated in *The E. B. Conine,* 233 Fed. 987, 147 C. C. A. 661. *The Frederick R. Ives* (D. C.), 25 Fed. 447, shows facts quite like this case" (p. 366).

In *The Caspian,* 14 F. (2d) 1006; affirmed 14 F. (2d) 1013 (C. C. A. 3), the Court in a similar case said:

"The question hence becomes one of the exercise of the good judgment of a well informed mind. Our final finding in effect is that every proper precaution to inform themselves of conditions was taken by respondents, and that, under the conditions known, and which should have been known to them, it was good judgment to attempt to do what was done and there was no negligence in it" (1013).

In *The Southern Cross,* 1927 A. M. C. 457 (S. D. N. Y., not reported in Federal), six tugs were moving the steamship *Southern Cross* from Mariners Harbor, Staten Island,

to Pier 3, Hoboken. In the vicinity of Bergen Point the *Southern Cross* brought up on the bottom. The towboat company and the tugs were libeled. The Court (A. N. Hand, *J.*), in dismissing the libel, said:

"* * * I am not disposed to scrutinize too narrowly conduct of skilled navigators dealing with a most difficult problem *in extremis*" (p. 459).

See also

The Lafayette, 269 Fed. 917 (C. C. A. 2);
The Stifinder, 275 Fed. 271, 276 (C. C. A. 2);
The Frederick E. Ives, 25 Fed. 447 (S. D. N. Y.).

Counsel for petitioner *assume* that because these other vessels struck an obstruction in this same vicinity they were negligent (Petitioner's brief, p. 27). This is in accord with the general theory of petitioner's case, viz., that because this vessel struck an obstruction, negligence is proved. They are clearly in error. The burden is on libellant (petitioner) to prove negligence, which it has failed to do.

In *Dampskibsselskabet Atalanta* vs. *United States,* 31 F. (2d) 961 (C. C. A. 5), a steamship collided with two spur dikes extending from the bank of the river. The Court said:

"We may assume that a pilot is bound to have a high degree of skill and to use more than ordinary care, but, if he in good faith exercises sound judgment, it does not follow that he is guilty of negligence merely because the vessel in his charge unfortunately has an accident" (p. 963).

In *The Pacific Maru,* 8 F. (2d) 166 (S. D. Ga.), the Court said:

"Both sides agree that the burden is upon the libelant to prove its case, and that the duty of the libelee is not that of a common carrier, but to exercise the skill and diligence that a skillful mariner would exercise under like circumstances; the libelee not being responsible for errors in judgment, if such errors did not in themselves constitute negligence. It is true that the libelant contends that certain facts in this case, when proven, are in the nature of *res ipsa*

loquitur, and sufficient to place upon the libelee the burden of showing that diligence was exercised. The court, not being a mariner, and not versed in the duties of towing and in the effective forces of machinery, cannot be certain of its conclusion, but it is impressed with the fact that the criticisims leveled at the captain of the towboat are cases of hindsight, rather than foresight. The proper way to measure the diligence and the skill is, as far as possible, to visualize the conditions as they then existed, as to time, speed, and surrounding conditions of all kinds" (p. 173).

The Lizzie F. Walker, 3 F. (2d) 921 (C. C. A. 4) (Petitioner's Brief, p. 32), was a collision between a steamer and a tow in the Chesapeake. The quoted language from the opinion omits the words "after the collision", where the asterisks are. The quotation has nothing to do with the decision, and has no bearing upon the vessel being held at fault.

The Steamboat New World v. *King,* 16 How. 469 (Petitioner's Brief, p. 35), was a personal injury case. The quotation is part of a discussion on the degrees of negligence and can be of no assistance in deciding the instant case.

SIXTH POINT

Petitioner assumed the risk of the manoeuvre

As soon as the pilot came on the steamer's bridge he warned Turnbull (petitioner's superintendent) of the danger because of the blasting and dredging in the vicinity, lack of channel markings and absence of reliable charts. He testified:

"Q. When you got on the bridge did you have any conversation with Mr. Turnbull? A. As soon as I arrived on the bridge I informed Capt. Turnbull, or Mr. Turnbull, that there was considerable risk in going up to this dock, and asked him if he knew where he was going.

Q. Did you explain to him why you said that? A. I told him about the channel, how they were blasting and digging,

and the channel had changed very much, there were dredges and drills up there, and you didn't know what you might find, and also all the conditions of the tide * * *" (R. 34-5).

Turnbull was satisfied to rely on Fort and "take the risks". Fort testified:

"* * * he (Turnbull) said, 'I will take the risks.' He said, 'If we do as good as we did the last time I will be very much pleased,'" (R. 35).

Again:

"Q. Now, you say when you told Mr. Turnbull that this was a dangerous place, he said that he understood, he had been there with you before, and that you did well then, didn't he? A. He said he would depend on my judgment and if I did as good a job then as I did before, he would be satisfied" (R. 43).

"Q. I say, if you had any thought of not wanting to go ahead with the ship, if Mr. Turnbull had said that he wouldn't have taken the risk? A. If he hadn't taken the risk, I would have taken the ship back to anchorage.

Q. After you were under way? A. Yes, sir.

Q. Where were you when the conversation took place? A. Right off Port Richmond, three-quarters of a mile from the place where the ship touched" (R. 36).

This conversation between the pilot and petitioner's marine superintendent was confirmed by Captain Bennett, who was on the bridge at the time (R. 48).

Turnbull at first testified that he did not remember any conversation with the pilot, although he did remember that Captain Bennett remained on the bridge (R. 26-7). Later, he denied that he had any conversation with the pilot having to do with the character of the channel and the dangers (R. 27-8). The master of the steamer did not remember anything about it (see Exhibits 3 and 4, R. 62).

We have no doubt that the conversation took place. It was clearly testified to by Fort, confirmed by Bennett and at first only vaguely denied by Turnbull (R. 26-7). However, he also denied knowledge of the "pilotage clause" and both of the

Courts below found against him (R. 78-9). The District Court found it unnecessary to pass upon this conversation, but from the Court's language we should say the District Judge believed that it did take place (R. 77).

Counsel for petitioner even contend that Turnbull was "without authority" to agree to take the risk on behalf of petitioner, and that if he did have authority, it was "gratuitous", not supported by "any consideration" (Petitioner's brief, p. 42).

Clearly he had charge of the matter for his company, not only for this ship, but other ships of the petitioner company (R. 23-5). If Turnbull had "no authority" to make the agreement, there could hardly be anyone who did have authority. We cannot believe that an assistant marine superintendent under these circumstances has no authority to agree to what Turnbull agreed to on this occasion.

Merchants' Bank v. *State Bank,* 10 Wall. 604, 644;
Dysart v. *Missouri, K. & T. Ry. Co.,* 122 Fed. 228, 230 (C. C. A. 8);
Globe & Rutgers v. *Warner Sugar Refining Company,* 187 App. Div. (N. Y.) 492, 495.

This brings us to the contention that Turnbull's promise was "gratuitous", referred to in petitioner's briefs below as "without any consideration" (Brief, p. 42). We can hardly conceive of a better consideration than that testified to by the pilot, viz., that he would not have continued on. To use his own words:

"If he (Turnbull) hadn't taken the risk, I would have taken the ship back to anchorage" (R. 36).

As to this, counsel for petitioner contend

"Of course, Fort (pilot) had no right to take petitioner's ship back to where Bennett had first taken her in charge, either with or without a promise from Turnbull; and to have done so would have been a breach of respondent's contract to complete the job that had been commenced at Stapleton" (Petitioner's brief, p. 43).

A rather astounding contention, viz., that the pilot was *bound* to continue and *complete the job,* whether or not he considered it advisable to do so, and whether it was dangerous or not. The mere statement refutes itself. Indeed, it strikes at the very foundation of good navigation and the necessity for precaution. No navigator is "bound" to keep on against his judgment in the face of danger. It is well settled that a tug master is at fault for failing to go back in the face of danger.

In *The Edgar H. Vance,* 284 Fed. 56 (C. C. A. 9), the Court said:

"* * * we are clearly of the opinion that he (tug captain) was grossly at fault in failing to return the tow to her anchorage while he confessedly had the ability to do so, * * *" (p. 58).

In *The E. A. Packer,* 22 Fed. 668 (S. D. N. Y.), the Court (Addison Brown, *J.*) said:

"I am satisfied that the most prudent course, the bay being apparently clear below, was to do what the *Packer* did, with the evident concurrence of the libellant's captain, namely, to attempt to return" (p. 671).

How ludicrous it would be if all pilots boarding steamers were "bound" to "complete the job" regardless of danger ahead or weather conditions! We have found no case to support the contention. We note none is cited in petitioner's brief.

Moreover, as this Court said in *Standard Oil Co.* v. *Anderson, supra,* 212 U. S. 215, "the servant himself, is, of course, liable for the consequences of his own carelessness" (p. 220). See also

The China, supra, 7 Wall. 53.

If Turnbull had not assumed the risk, Fort was entitled to, and from the evidence he intended to, refuse to proceed as much in his own financial interest as in the interest of the safety of the ship.

SEVENTH POINT

Petitioner failed to prove its case

This is an ordinary case of failure of proof on the part of libellant (petitioner) as to both the tugs and respondent. Petitioner alleged particular acts of negligence against both respondent and the three tugs, viz., the *Dalzellite, W. F. Dalzell* and *Fred B. Dalzell, Jr.*

As to the tugs, the libel alleged that they were "carelessly and negligently navigated", "not properly manned and equipped", "they (tugs) failed to make due allowance for the tide", "they (tugs) did not keep the *Sabine Sun* under proper control" and "they (tugs) failed to keep the *Sabine Sun* in the ship channel and permitted that vessel to strand in shallow water, a duly charted obstruction" (R. 3).

Petitioner completely failed to prove *any* of these allegations. On the contrary, the only testimony in the record is that the tugs obeyed and executed *properly* all the orders given them and did everything required of them (R. 46-7). In fact, any fault on the part of the tugs has been abandoned on this appeal (Petitioner's brief, p. 2).

As to respondent, the libel alleges "In that the Dalzell Towing Company, Inc., furnished a pilot by reason of whose negligence in not giving proper directions to the tugs * * * and in not keeping the *Sabine Sun* in proper control, the stranding was due" (Libel, Art. 6, R. 3).

But petitioner failed to prove any negligence of the pilot, as we have pointed out above. On the other hand, if the pilot was negligent (which we deny) respondent Dalzell Towing Company is not liable, as he (pilot) became petitioner's servant when he went on the steamer's bridge and acted as pilot pursuant to the terms of the "pilotage clause".

LACHES

In conclusion we call the Court's attention to the failure of petitioner to explain, or excuse the failure to make any claim against respondent or against the tugs, or assert any negligence against them, until nearly *one year after the accident.* It is fair to conclude that if there had been any sincere intention at the time, of disputing the "pilotage clause" or Turnbull's agreement to assume the risk of the manœuvre, the respondent Dalzell Company would have been notified, or at least given an opportunity to attend upon the survey of the damage which is alleged in the libel to amount to $25,000 (R. 3-4, 49-50).

A similar situation existed in *Pan American* v. *Martin and Steamtugs Caspian and Adriatic* (*The Caspian*), 14 F. (2d) 1006; affirmed, 14 F. (2d) 1013 (C. C. A. 3). In that case the accident was on April 13, 1919. A survey was held April 19, 1919, without notice to the tugboat company (respondent) or the owners of the tugs (*Caspian* and *Adriatic*). A libel was filed about one year later, April 3, 1920. The Court said that the claim "may be fairly characterized as a stale one" (p. 1011), and dismissed the libel.

CONCLUSION

THE DECISION OF THE CIRCUIT COURT OF APPEALS SHOULD BE AFFIRMED.

Respectfully submitted,

CHAUNCEY I. CLARK,
Counsel for Respondent.

Dated, New York, November 7, 1932.